

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Lassen)

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JAY DOW,  
  
Plaintiff and Appellant,  
  
v.  
  
LASSEN IRRIGATION COMPANY,  
  
Defendant and Respondent.

C068550  
  
(Super. Ct. No. 4573)

APPEAL from a judgment of the Superior Court of Lassen County, F. Donald Sokol, Judge. Reversed with directions.

Mennemeier, Glassman & Stroud and Margaret Carew Toledo and Stephen Lau; O'Laughlin & Paris and William Paris for Plaintiff and Appellant.

Kronick, Moskovitz, Tiedemann & Girard and Scott A. Morris and William T. Chisum for Defendant and Respondent.

Kamala D. Harris, Attorney General, Kathleen A. Kenealy, Assistant Attorney General, Joseph Barbieri, Deputy Attorney General; Michael A.M. Laufer, Andrew H. Sawyer, and Marianna Aue, for State Water Resources Control Board as Amicus Curiae, upon request of the Court of Appeal.

This water rights case involves the interpretation of a decree in a stream adjudication and, more particularly, the

interplay between the right to divert water to storage in a reservoir and the right to divert water for direct application to beneficial use.

The specific issue here is whether the trial court correctly interpreted a 1940 judgment and decree in an adjudication of the water rights on the Susan River stream system (the Susan River decree). We conclude the court did not correctly interpret the decree. As we will explain, the trial court erred in determining that paragraph 21 of the decree gives defendant Lassen Irrigation Company (the Irrigation Company) a right to divert water from the Susan River for direct application to beneficial use that is measured by the capacity of the Irrigation Company's three reservoirs (estimated at 31,500 acre-feet). Properly interpreted, the Susan River decree does give the Irrigation Company a right to divert water for direct application to beneficial use, but that right is provided for in a different part of the decree and is measured in cubic feet per second (cfs), not acre-feet.<sup>1</sup> Paragraph 21 of the decree dictates when that right of direct diversion (and the Irrigation Company's right to store water) can be exercised, but

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<sup>1</sup> For ease of reference, we will sometimes refer to diversion of water for direct application to beneficial use as simply direct diversion, which stands in contrast to diversion of water to storage, from where it is to be applied to beneficial use at a later date. (See *Bazet v. Nugget Bar Placers, Inc.* (1931) 211 Cal. 607, 618 ["Storage of water in a reservoir is not in itself a beneficial use. It is a mere means to the end of applying the water to such use"].)

it does not establish a right to direct diversion itself. Because the trial court erred in construing the decree, we will reverse the court's order and remand the case for the court to enter a new order consistent with this opinion.

#### FACTUAL AND PROCEDURAL BACKGROUND

##### *The Susan River System*

As the report on which the Susan River decree was largely based explains,<sup>2</sup> the "Susan River has its source on the east slope of the Sierra Nevada . . . in the southwesterly portion of Lassen County . . . at an elevation of about 7,900 feet. Its channel follows a general easterly direction from Silver Lake through McCoy Flat Reservoir and through Susanville and on to Honey Lake to which it is tributary. . . ."

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<sup>2</sup> In describing the Susan River system, the Irrigation Company's use of water from the river, and the background of the litigation leading to the Susan River decree, we draw on the report of the former Division of Water Resources dated February 20, 1936 (the report), which, along with a stipulation for judgment, was "the only evidence offered or introduced at . . . trial" in the case that resulted in the Susan River decree. The Irrigation Company requested that we take judicial notice of certain portions of the report as they "relate[] to and describe[] lands receiving water via direct diversion by [the Irrigation Company]." Plaintiff Jay Dow did not oppose that request. We subsequently asked the Irrigation Company to provide us with a full copy of the report, which it did. We take judicial notice of the report as a court record (Evid. Code, § 452, subd. (d)(1)) to assist us in interpreting the resulting decree. (See *L. A. Local etc. Bd. v. Stan's Drive-Ins, Inc.* (1955) 136 Cal.App.2d 89, 94 ["The rule with respect to orders and judgments is that the entire record may be examined to determine their scope and effect"].)

"Susan River has four important tributaries, namely, Piute Creek which comes in from the north at Susanville, Gold Run Creek and Lassen Creek which come in from the south between Susanville and Johnstonville, and Willow Creek which is tributary from the north above Standish."<sup>3</sup>

"Under normal conditions the flows of Lassen and Gold Run Creeks and of Susan River above Susanville are fairly well sustained from melting snows until early in June."

*The Irrigation Company's Use Of The River*

With respect to the Irrigation Company's use of water from the Susan River, the report notes the following:

The Irrigation Company provides water from the Susan River to irrigate a total of 5,864.7 acres that lie south of the river to the southeast of Susanville.<sup>4</sup> The Irrigation Company owns and operates three reservoirs: McCoy Flat Reservoir (Diversion 6), Hog Flat Reservoir (Diversion 7), and the Leavitt Lake Reservoir (Diversion 239).<sup>5</sup> McCoy Flat Reservoir (which lies west of Susanville) "is situated on the main channel of Susan River and

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<sup>3</sup> A map depicting the Susan River and its major tributaries is included as an appendix to this opinion.

<sup>4</sup> The acreage irrigated by the Irrigation Company is "depicted in cross-hatched green on Map Sheets 3 and 6" of the map sheets that were included with the report. Color copies of those map sheets appear in the record on appeal as exhibits 3 and 4 to the request for judicial notice filed by amicus curiae California State Water Resources Control Board. We grant the Board's unopposed request for judicial notice.

<sup>5</sup> This latter reservoir is also referred to as Lake Leavitt.

has a maximum capacity of about 13,000 acre feet." The water stored in McCoy Flat Reservoir is "released during the summer to supplement the water stored in Hog Flat and Leavitt Reservoirs" (described hereafter).

Hog Flat Reservoir (which lies east of McCoy Flat and west of Susanville) "is situated on Hog Flat Branch of Susan River and has a maximum capacity of about 6[,]400 acre feet." The water stored in Hog Flat Reservoir is "released during the summer to supplement the water stored in McCoy Flat and Leavitt Reservoirs."<sup>6</sup>

Lake Leavitt (which lies east of Susanville) "is formed by an earth dam or levee about one and three-fourths miles in length which closes the open side of a natural basin." The lake "has a normal capacity of about 12,100 acre-feet and is filled by the diversion of water from Susan River through the A and B Canal." That canal (also known as the Adams and Batcheldor Ditch or A and B Ditch and identified as Diversion 41) runs "from the south side of Big Slough Channel of Susan River." The canal "consists of an earth ditch five and one-fourth miles in length to where it empties into Leavitt Reservoir."

A few shareholders of the Irrigation Company have land along the A and B Canal and receive some of their water directly from the canal. According to the report, that land amounts to 295.7 acres. The remainder of the 5,864.7 acres of land

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<sup>6</sup> Both McCoy Flat and Hog Flat Reservoirs lie at an elevation of about 5,500 feet.

receiving water from the Irrigation Company is irrigated with water released from Lake Leavitt into an outlet canal that is about eight-miles long.

The report also notes that the Irrigation Company owns the Colony Dam, which is located on the Susan River at the junction with Willow Creek. The dam is "used primarily for regulatory purposes to maintain a steady flow of 20 cubic feet per second of Susan River water passing the dam when diversion of natural flow from the river is being made into Leavitt Lake Reservoir."<sup>7</sup> At the time of the report, water could also be diverted at the dam into the Colony Dam Ditch (Diversion 55), which was "used as a supplemental direct diversion supply to the water stored in the Leavitt Reservoir." It appears, however, that the Irrigation Company no longer uses this point of diversion at this time.

*The Background Of The Susan River Decree*

The report noted that from 1893 forward, "various groups of water right owners . . . ha[d] been involved in a number of cases of water right litigation on Willow Creek, Gold Run Creek, Lassen Creek, Upper Susan River, and on Piute Creek. The narrow scope of the issues involved rendered unsatisfactory results from the various cases, because as conditions changed different combinations of issues arose which threatened expensive and continued litigation. In view of this situation, more than

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<sup>7</sup> The basis for the Irrigation Company providing 20 cfs in flow at this point in the river will become apparent later.

ninety per cent of the water right owners entered into an agreement during the summer of 1934 to seek an adjudication of each right in respect to all other rights in the Susan River stream system under the court reference procedure of [former] Section 24 of the Water Commission Act.

"Following the above mentioned agreement, the case of J.J. Fleming etal. [sic] v. J. R. Bennett, etal. [sic], was instituted in the Superior Court of California, in and for the County of Lassen, on July 24, 1934. . . . The case was referred by said court to the [former] Division of Water Resources on August 21, 1934, under the provision of [former] section 24 of the Water Commission Act for investigation and report as referee.

"A survey and map of the diversions and irrigated lands in the Susan River stream system and an investigation of record facts were made by the referee between August 25, 1934 and March 15, 1935." As the California Supreme Court later explained in *Fleming v. Bennett* (1941) 18 Cal.2d 518, the resulting report was "comprehensive. It consist[ed] of 195 pages of findings and conclusions and as many or more pages of schedules, tables and plates. It deal[t] with and recommend[ed] findings with respect to 259 claimed rights of water users in the Susan River watershed." (*Id.* at p. 525.) "On April 18, 1940, the court rendered its final decree based in the main on the report filed by the referee." (*Id.* at p. 520.) Thereafter, in August 1941, the Supreme Court affirmed the decree. (*Id.* at p. 530.)

*The Susan River Decree*

The major provisions of the Susan River decree, on which the resolution of this case turns, are as follows: Paragraph 7 of the decree explains that the water rights involved fall into four classifications. The first set of rights, addressed in paragraphs 22 through 40 of the decree, are of "independent character and absolute priority" because under those rights "the respective parties take all of the flow of various springs and small tributaries and have for more than five years prior to the commencement of this action long continued to do so." The decree describes these rights as "special class" water rights and characterizes them as "independent of each other" and as "superior in priority and in right to all other rights in the Susan River stream system."

The decree describes the other three sets of water rights as "interrelated" water rights. The first set of interrelated rights are "[t]hose which derive their water supply from Willow Creek" and the Susan River below Willow Creek. Those rights, which are "divisible into two priority classes," are addressed in paragraph 45 and in Schedule 3 of the decree.<sup>8</sup>

The second set of interrelated rights are "[t]hose upon Gold Run Creek, Lassen Creek, Piute Creek and their tributaries, which are three separate units." Those rights, which are

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<sup>8</sup> Schedule 1 of the decree consists of a description of the areas irrigated from the Susan River and its tributaries. Schedule 2 of the decree consists of a list of the various points of diversion from the river and its tributaries.

divided into priority classes within each unit, are addressed in paragraphs 41, 42, 43, and 46 and in Schedule 4 of the decree.

The third set of interrelated rights are "[t]hose upon Susan River and upon its tributaries above Piute Creek." Those rights, which are divided into eight priority classes, are addressed in paragraphs 44 and 47 to 52 and in Schedules 5 and 6 of the decree.

*The Irrigation Company's Rights Under The Decree*

The Irrigation Company has a first priority class right under Schedule 6 of the decree. That schedule gives the Irrigation Company the right to divert 36.65 cfs at Diversions 6, 7, 41, 55, and 239 to supply the company's 5,864.7 acres. Regarding that Schedule 6 right, paragraph 48 of the decree provides in relevant part as follows:

"Subject to all of the foregoing rights and provisions, the various parties hereinafter enumerated in Schedule 6 are entitled to rights in and to the use of the natural flow of Susan River and its tributaries during the seasons hereinbefore defined in paragraph 21, for domestic, stock-watering and irrigation purposes upon their respective lands as shown on said Division of Water Resources Map, and as hereinafter described under their respective names in Schedule 1, in accordance with the acreages to be supplied, priorities and quantities of water allotted, and through the diversions as set forth in said Schedule 6; . . . provided however, that diversion of all allotments set forth in said Schedule 6 shall be limited to the amounts directly applied to beneficial use with the exception of

the allotments to Lassen Irrigation Company [and certain others] which may be diverted to storage."<sup>9</sup>

Among other things, paragraph 49 of the decree explains that "[a]ll rights in first priority class hereinafter set forth in said Schedule 6 are subject and inferior to all rights set forth in said Schedules 3, 4 and 5, but are superior in priority and in right to all other rights set forth in said Schedule 6."

In addition to its right to divert under Schedule 6, the Irrigation Company has a right to store water under paragraph 50 of the decree, as follows:

"Subject to the foregoing rights and provisions, Lassen Irrigation Company is entitled to impound the natural flow of Susan River and its tributaries in the McCoy Flat, Hog Flat, and Lake Leavitt Reservoirs at points designated respectively on Division of Water Resources Map as Diversions 6, 7 and 239 as hereinafter described in Schedule 2, in an amount equal to the present combined capacity of said reservoirs, or approximately 31,500 acre-feet per annum, during the season hereinbefore stated in paragraph 21, or as much of said amount of water as is impounded in said reservoirs . . . and thereafter withdrawn from

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<sup>9</sup> Paragraph 48 also specifies that "diversion of the continuous flow equivalents of allotments provided in Schedule 6 may be made at twice the rates set forth in said Schedule 6 for one-half of the time during any 90-day period whenever water is available therefor." In referring to the Irrigation Company's right to divert 36.65 cfs under Schedule 6, we necessarily intend to include the concomitant right to divert at twice that rate for half the time in any 90-day period when water is available to divert at the higher rate.

said reservoirs during the period from January 1 to December 31 of each year and applied to beneficial use for domestic and stock-watering purposes and for the irrigation of the lands of the stockholders of said company as hereinafter described under the name of said company in Schedule 1."

Paragraph 21 of the decree, which is referenced in both paragraph 48 and paragraph 50 (and all of the other paragraphs in the decree granting water rights), and which lies at the heart of the dispute in this case, provides as follows:

"All diversion for domestic, stock-watering, municipal and industrial purposes under the rights hereinafter provided and for irrigation purposes under the rights of 'special class' hereinafter set forth in paragraphs 22 to 40, inclusive, shall be for continuous usage without regard to season; the season of diversion of water for general irrigation purposes under the rights hereinafter set forth in Schedules 3, 4, 5 and 6, shall be for continuous usage during the period from March 1, to October 31, both dates inclusive, of each and every year and during said period all rights set forth in said schedules shall be superior to the storage rights hereinafter provided in paragraphs 41, 42, 43, 44, 50, 51 and 52; except that no water shall be diverted through Diversions 106 to 114, inclusive, (said diversions being located as hereinafter described in Schedule 2) between June 20 and August 1 of each and every year; except further, that Lassen Irrigation Company shall be entitled to divert, or store up to the present capacity of its reservoirs, estimated at 31,500 acre-feet, from the natural flow

of Susan River between March 1 and July 1 of each year when the flow of said Susan River is in excess of 20 cubic feet per second, measured immediately above the confluence of said river with Willow Creek, and at all other times when the flow of said river is in excess of 5 cubic feet per second measured at said point, irrespective of and notwithstanding the allotments granted to users in said Schedules 3 and 6 and to users of third priority class in said Schedule 5 . . . and that during the period from November 1 of each and every year to the last day of February of the succeeding year, both dates inclusive, the rights hereinafter provided for the storage of the waters of said Susan River and its tributaries shall be superior to all irrigation rights, from said stream system, but said storage rights shall at all times be inferior and subject to the rights from said stream system for domestic, stock-watering, municipal and industrial purposes of the parties hereto, who require water from said stream system for said domestic, stock-watering, municipal and industrial purposes."

*The Present Dispute*

Dow owns four ranches and leases one; together, they comprise the Dow Ranch, on which he raises cattle and grows grass hay, alfalfa hay, alfalfa seed, corn, pasture, and grains. As the owner/lessor of these lands, Dow possesses a number of water rights governed by the Susan River decree amounting to an aggregate flow of 26.38 cfs under Schedules 3, 5, and 6 of the

decree.<sup>10</sup> Dow's rights do not include any storage but instead are limited to diversion for direct application to beneficial use. All of Dow's points of diversion are downstream from the confluence of the Susan River and Willow Creek and thus below all of the Irrigation Company's points of diversion.

In the spring of 2008, Dow believed he was not receiving his full allotment of water under the decree, so he contacted the watermaster to find out what was happening.<sup>11</sup> He was informed that the Irrigation Company was being allowed to divert water into Lake Leavitt even though the Irrigation Company was simultaneously releasing water from the reservoir for use by its shareholders. Believing this was not permitted by the decree, Dow filed a complaint with the watermaster. In his complaint, Dow asserted that the watermaster was "'allowing [the Irrigation Company] to divert Schedule 6 water when Schedule 5 water is not at 100% allocation.'" In essence, it was Dow's position that by diverting water into Lake Leavitt at the same time it was releasing water from the lake, the Irrigation Company was directly diverting water to beneficial use under its Schedule 6 rights, which was in violation of the priorities in the decree

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<sup>10</sup> Specifically, Dow is entitled to 6.06 cfs under Schedule 3, 15.87 cfs under the third priority class in Schedule 5, and 4.45 cfs under the first priority class in Schedule 6.

<sup>11</sup> Before 2008, the Department of Water Resources provided watermaster services on the Susan River. In 2008, that role was assumed by the Honey Lake Valley Resource Conservation District (the watermaster).

since Schedule 5 users like Dow were not receiving all of their Schedule 5 water.

Ultimately, in May 2009, the watermaster formally denied Dow's claim. The watermaster interpreted paragraph 21 of the decree as allowing the Irrigation Company to either store or directly divert to beneficial use up to 31,500 acre-feet per year. Thus, the watermaster concluded that the Irrigation Company was not taking Schedule 6 water before all Schedule 5 users received their full allotment but instead was directly diverting water to beneficial use pursuant to its rights under paragraph 21 of the decree.

In December 2010, Dow filed a motion in the *Fleming* case (No. 4573) to interpret and enforce the decree. By his motion, Dow asked the court to confirm that: (1) the Susan River decree gives the Irrigation Company only two water rights, one for storage under paragraph 50 and one for direct diversion to beneficial use under Schedule 6; (2) nothing in the decree authorizes or empowers the Irrigation Company to divert its storage right under paragraph 50 for direct application to beneficial use; and (3) each year the Irrigation Company may fill each of its three reservoirs only once unless the Irrigation Company uses water available under its Schedule 6 rights or water determined to be excess to the system. The main thrust of Dow's argument was that the watermaster erred in interpreting the decree to allow the Irrigation Company "to divert the continuous flow equivalent of 31,500 [acre feet] to be directly applied to a beneficial use."

The Irrigation Company opposed Dow's motion, contending that the decree "expressly allows [the Irrigation Company] to both divert or store Susan River water as long as certain flows are maintained in the Susan River."

The trial court sided with the Irrigation Company, concluding that the word "divert," as used in paragraph 21, means "diversion for direct application [to] beneficial use as opposed to storage." Based on this interpretation, the court concluded that paragraph 21 allows the Irrigation Company to either divert for direct application to beneficial use or store up to 31,500 acre-feet of water annually, subject to the minimum flow requirements immediately above Willow Creek.

Dow filed a timely notice of appeal from the order interpreting the decree.

#### DISCUSSION

On appeal, Dow contends the trial court erred in construing the Susan River decree with respect to the Irrigation Company's rights. We agree.

"The same rules apply in ascertaining the meaning of a court order or judgment as in ascertaining the meaning of any other writing. [Citation.] The rule with respect to orders and judgments is that the entire record may be examined to determine their scope and effect . . . ." (*L. A. Local etc. Bd. v. Stan's Drive-Ins, Inc.*, *supra*, 136 Cal.App.2d at p. 94.) "Individual clauses or provisions of a judgment, just as in a contract or any other document, are not to be separately considered and construed but, on the contrary, the entire document is to be

taken by its four corners and construed as a whole to effectuate the obvious intention." (*Lazar v. Superior Court* (1940) 16 Cal.2d 617, 622.)

The main question here is whether, construing the Susan River decree as a whole, paragraph 21 of the decree can be reasonably understood as giving the Irrigation Company the right to directly divert to beneficial use up to 31,500 acre-feet of water annually provided the flow requirements immediately above Willow Creek are met. The answer to that question is "no."

As Dow points out, construing paragraph 21 as giving the Irrigation Company a right to direct diversion not expressed elsewhere in the decree is inconsistent with the structure of the decree as a whole. As we have pointed out, paragraph 7 of the decree specifies that "the rights involved in [the underlying] action fall into four classifications" and then sets out those classifications as follows:

(a) Special class rights, as set forth in paragraphs 22 to 40;

(b) Interrelated rights on Willow Creek and the Susan River below Willow Creek, as set forth in paragraph 45 and Schedule 3;

(c) Interrelated rights on Gold Run Creek, Lassen Creek, Piute Creek and their tributaries, as set forth in paragraphs 41, 42, 43, and 46 and Schedule 4; and

(d) Interrelated rights on the Susan River and its tributaries above Piute Creek, as set forth in paragraphs 44 and 47 to 52 and Schedules 5 and 6.

Similarly, paragraph 19 explains that special class rights are "set forth in paragraphs 22 to 40" and interrelated rights are "set forth in paragraphs 41 to 52 . . . and in Schedules 3, 4, 5 and 6."

It is reasonable to conclude that if the court had intended paragraph 21 to give the Irrigation Company a right to direct diversion not found elsewhere in the decree, the decree would have included paragraph 21 in the lists of paragraphs in paragraphs 7 and 19. The fact that the decree does not do so supports Dow's position that paragraph 21 was not intended to give the Irrigation Company a right to direct diversion not expressed elsewhere in the decree.

This understanding is consistent with paragraph 21's apparent role in the decree, when it is examined in connection with the remainder of the decree. In each paragraph in which water rights are granted or recognized, the decree specifies that the direct diversion or storage right can be exercised "during the season hereinbefore stated in paragraph 21." Thus, for example, paragraph 48 specifies that "the various parties enumerated in Schedule 6 are entitled to rights in and to the use of the natural flow of Susan River and its tributaries during the seasons hereinbefore defined in paragraph 21." As another example, paragraph 50 specifies that the Irrigation Company "is entitled to impound the natural flow of Susan River and its tributaries in the McCoy Flat, Hog Flat, and Lake Leavitt Reservoirs at points designated respectively on Division of Water Resources Map as Diversions 6, 7 and 239 as hereinafter

described in Schedule 2, in an amount equal to the present combined capacity of said reservoirs, or approximately 31,500 acre-feet per annum, during the season hereinbefore stated in paragraph 21 . . . ."

From these multiple references, it seems apparent that paragraph 21 was not intended to grant any water rights, but instead was intended to *qualify* or *limit* rights granted elsewhere in the decree -- particularly by specifying *when* those rights can be exercised. To that end, paragraph 21 begins by providing that "[a]ll diversion for domestic, stock-watering, municipal and industrial purposes under the rights hereinafter provided and for irrigation purposes under the rights of 'special class' hereinafter set forth in paragraphs 22 to 40, inclusive, shall be for continuous usage without regard to season." In other words, paragraph 21 first makes clear that there is no seasonal limitation on water diverted for domestic, stock-watering, municipal and industrial purposes or on water diverted for irrigation purposes by those with special class rights.

Next, paragraph 21 addresses irrigation rights for those with interrelated rights under Schedules 3, 4, 5, and 6 by specifying that "the season of diversion of water for [those rights] shall be for continuous usage during the period from March 1, to October 31, both dates inclusive, of each and every year." Paragraph 21 then establishes the relative priority between these interrelated irrigation rights and the various "storage rights hereinafter provided in paragraphs 41, 42, 43,

44, 50, 51 and 52" by specifying that from March through October -- the period during which the interrelated irrigation rights may be exercised -- those rights "shall be superior to" the storage rights. What then follow are a series of exceptions to the foregoing provisions on season of use and priority of irrigation rights over storage rights.

Turning to the second of those exceptions (beginning with "except further"), which is the one at issue here, we can see that construing that exception as granting the Irrigation Company a right to directly divert to beneficial use up to 31,500 acre-feet of water annually -- as the trial court did here -- is not only inconsistent with the overall structure of the decree and with paragraph 21's apparent role in that structure (as we have explained), but it is also inconsistent with the grammatical structure of the exception itself. The exception specifies that the "Irrigation Company shall be entitled to divert, or store up to the present capacity of its reservoirs, estimated at 31,500 acre-feet, from the natural flow of Susan River" at certain times subject to certain flow requirements immediately above Willow Creek. "While not controlling, punctuation is to be considered in the interpretation of a [document]." (*Duncanson-Harrelson Co. v. Travelers Indemnity Co.* (1962) 209 Cal.App.2d 62, 66.) Where, as here, a "clause is set off from the rest of the main sentence by commas," it "should be read as a parenthetical clause" because such a grammatical structure "indicates an intent to segregate th[e] clause from the rest of the sentence." (*Ibid.*)

Reading the clause set off by commas here as a parenthetical clause results in the following understanding of the operative exception in paragraph 21:

1) The Irrigation Company is "entitled to divert . . . from the natural flow of Susan River" between March 1 and July 1 when the flow of the river is in excess of 20 cfs immediately above Willow Creek and at all other times when the flow there is in excess of 5 cfs; and

2) The Irrigation Company is "entitled to . . . store up to the present capacity of its reservoirs, estimated at 31,500 acre-feet, from the natural flow of Susan River" between March 1 and July 1 when the flow of the river is in excess of 20 cfs immediately above Willow Creek and at all other times when the flow there is in excess of 5 cfs.

Read in this manner, paragraph 21 does *not* grant the Irrigation Company the right to directly divert to beneficial use an amount of water equal to the capacity of its reservoirs, as the trial court concluded. This makes particular sense in light of the fact that nowhere else in the decree is a right to direct diversion to beneficial use expressed in acre-feet. An acre-foot is "the volume (as of irrigation water) that would cover one acre to a depth of one foot." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 11, col. 2.) Thus, it is a measure of water that is not moving. Indeed, the decree consistently uses acre-feet to describe the amount of water that may be stored in a reservoir. *Moving* water, on the other hand -- that is, flowing water that is diverted for direct

application to beneficial use -- is consistently described in the decree in terms of cubic feet per second.

While paragraph 21 does not specify how many cubic feet per second of water the Irrigation Company is "entitled to divert . . . from the natural flow of Susan River," that omission is easily explained in a manner consistent with our understanding of paragraph 21's role in the decree. Because paragraph 21 does not grant any water rights, but instead only qualifies or limits water rights granted elsewhere in the decree, the reference to the Irrigation Company's right to "divert . . . from the natural flow of Susan River" must be a reference to a right to direct diversion to beneficial use granted somewhere else in the decree. Because the Irrigation Company has only one right to direct diversion to beneficial use under the decree -- the right provided in Schedule 6 -- it follows that the reference in paragraph 21 to the Irrigation Company's right "to divert" must be a reference to the Irrigation Company's Schedule 6 right.

Understood in this manner, the exception in paragraph 21 under consideration serves to specify when the Irrigation Company may exercise its water rights under Schedule 6 and paragraph 50 of the decree. Specifically, notwithstanding the general provisions in paragraph 21 that the interrelated irrigation rights in Schedules 3, 4, 5 and 6 may be exercised only from March through October and that during that period those irrigation rights are superior to any storage rights in the decree, the Irrigation Company can either: (1) divert under its Schedule 6 right, at up to 36.65 cfs; or (2) store up to the

capacity of its reservoirs, estimated at 31,500 acre-feet, between March 1 and July 1 when the flow of the Susan River is in excess of 20 cfs immediately above Willow Creek and at all other times when the flow is in excess of 5 cfs.<sup>12</sup>

Significantly, the exception in paragraph 21 pertaining to the Irrigation Company also specifies that the Irrigation Company's rights to divert and store water subject to the flow requirements immediately above Willow Creek are "irrespective of and notwithstanding the allotments granted to users in said Schedules 3 and 6 and to users of third priority class in said Schedule 5." This provision is significant because essentially it gives the Irrigation Company's rights a different priority than they would otherwise have under the terms of the decree. To truly understand the effect of this altered priority, it is necessary to take a closer look at the schedules in the decree.

First, it must be noted that the exception in paragraph 21 pertaining to the Irrigation Company's rights does not mention Schedule 4. This makes sense because, as we have noted, Schedule 4 involves rights on Gold Run Creek, Lassen Creek, and Piute Creek, which are all tributary to the Susan River. Because the Irrigation Company's points of diversion are all on the Susan River itself, it follows that the Irrigation Company's diversion of water from the river can have no effect on those

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<sup>12</sup> It should be noted that under the terms of paragraph 48, the Irrigation Company is entitled to divert water under its Schedule 6 right to storage as an alternative to diverting that water for direct application to beneficial use.

water users entitled to divert under Schedule 4, because those users take their water from the system before it ever reaches the Susan River.

Users (like Dow) entitled to water under Schedules 3, 5, and 6, or at least some of them, stand in a different position with respect to the Irrigation Company because their water rights can be affected by the Irrigation Company's exercise of its rights.<sup>13</sup> As we have seen, however, the exception in paragraph 21 pertaining to the Irrigation Company entitles the Irrigation Company to exercise its rights "irrespective of and notwithstanding the allotments granted to users in said Schedules 3 and 6 and to users of third priority class in said Schedule 5." The only users not mentioned in this clause are those in the first and second priority classes in Schedule 5. A review of Schedule 5 reveals that the first and second priority classes in that schedule encompass points of diversion ranging from Diversion 2 to Diversion 54. And an examination of the map included with the report shows that all of those points of diversion lie along the Susan River above the confluence of the river with Willow Creek, with Diversion 54 being the last point of diversion on the river before Willow Creek.

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<sup>13</sup> This is not true of users under Schedule 3 who take their water from Willow Creek above its confluence with the Susan River, nor is it true of the user entitled to divert from the Susan River at Diversions 2, 3, 4, and 5, because those points of diversion all lie above the Irrigation Company's first point of diversion (Diversion 6) at McCoy Flat Reservoir.

What this means is that, provided the required flow immediately above Willow Creek is met, the exception in paragraph 21 pertaining to the Irrigation Company allows the Irrigation Company to exercise its rights to divert under Schedule 6 and store under paragraph 50 irrespective of all other users on the Susan River except for those with points of diversion above the confluence with Willow Creek. In essence, then, the Irrigation Company must leave enough water in the river: (1) to satisfy the users along the river from immediately below the McCoy Flat and Hog Flat Reservoirs down to the confluence of the river with Willow Creek (i.e., those users in the first and second priority classes in Schedule 5); and (2) to meet the minimum flow requirements immediately above Willow Creek. If it does so, then the Irrigation Company can divert up to 36.65 cfs for direct application to beneficial use (or for storage) under its Schedule 6 rights and it can store up to the capacity of its reservoirs, estimated at 31,500 acre-feet, under paragraph 50.

Based on this reading of the Susan River decree, we conclude the trial court erred in construing the decree with respect to the Irrigation Company's rights. Specifically, the trial court was incorrect in its conclusion that under paragraph 21 the Irrigation Company has a right to direct diversion to beneficial use that is measured by the capacity of its reservoirs, estimated at 31,500 acre-feet. The Irrigation Company's only right to divert for direct application to

beneficial use is its right under Schedule 6, which is measured in cubic feet per second (36.65).

As we have explained, however, the Irrigation Company's right to divert under Schedule 6 is subject to the terms of paragraph 21, and those terms give the Irrigation Company's Schedule 6 right greater priority than it would otherwise have. For example, as long as the minimum flow requirements immediately above Willow Creek are satisfied and the Irrigation Company leaves enough additional water in the river to satisfy the users on the river above the confluence with Willow Creek, the Irrigation Company can directly divert up to 36.65 cfs under its Schedule 6 right irrespective of other users like Dow with rights under the third priority class in Schedule 5 and the first priority class in Schedule 6. And this is true even if the Irrigation Company has already stored all the water it is entitled to store under paragraph 50 of the decree. That means there may be times when Dow is not receiving all of the water to which he is entitled under Schedules 5 and 6 but the Irrigation Company is able to divert water into an otherwise full Lake Leavitt at the same time it is simultaneously releasing water from the reservoir for use by its shareholders. In such an instance, the water passing through the lake is water available to the Irrigation Company under its Schedule 6 right, which by the terms of paragraph 21 takes priority over Dow's rights.

Because we conclude the trial court did not correctly interpret the Susan River decree, we reverse the trial court's

order and remand for the court to enter a new order consistent with our interpretation of the decree.

DISPOSITION

The order is reversed and the case is remanded to the trial court to enter a new order consistent with this opinion. Dow shall recover his costs on appeal. (Cal. Rules of Court, rule 8.276(a)(1).)

\_\_\_\_\_ ROBIE \_\_\_\_\_, Acting P. J.

We concur:

\_\_\_\_\_ BUTZ \_\_\_\_\_, J.

\_\_\_\_\_ MAURO \_\_\_\_\_, J.